

*United States Court of Appeals  
for the Second Circuit*



**APPELLEE'S BRIEF**



74-2392

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
No. 74-2392

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PHILLIP A. FERRATO, individually and as  
President of the New York State Parkway Police  
Benevolent Association of Long Island, Inc.,  
and the NEW YORK STATE PARKWAY POLICE BENEVOLENT  
ASSOCIATION OF LONG ISLAND, INC.,

Plaintiffs-Appellants,  
-against-

MALCOLM WILSON, as Governor the State of New York,  
and the STATE OF NEW YORK PUBLIC EMPLOYMENT  
RELATIONS BOARD,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

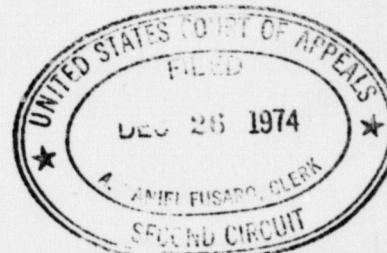
BRIEF OF APPELLEE,  
GOVERNOR MALCOLM WILSON

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UNITED STATES COURT OF APPEALS  
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PHILLIP A. FERRATO, individually and as  
President of the New York State Parkway  
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Inc., and the NEW YORK STATE PARKWAY POLICE  
BENEVOLENT ASSOCIATION OF LONG ISLAND, INC.,

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York, and the STATE OF NEW YORK PUBLIC  
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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE,  
GOVERNOR MALCOLM WILSON

Question Involved

Do the results of prior proceedings maintained by and on  
behalf of the plaintiff Association in the Courts of New York  
constitute res judicata in this action?

Statement

This is an appeal from an order of the District Court (Hon. James T. FOLEY, D.J.) which granted defendants' motion to dismiss the complaint (20a)\*.

Plaintiffs are the president of New York State Parkway Police Benevolent Association of Long Island, Inc. (hereinafter "the Association"), individually and in his representative capacity, and the Association itself (4a).

Defendants are the Governor of the State of New York and the State Public Employment Relations Board (hereinafter PERB) his appointees, which Board has statutory responsibilities in the administration of the Public Employees Fair Employment Act (New York Civil Service Law, Article 14, §§ 200 et seq.), popularly known as the Taylor Law (5a).

The complaint alleged that the action of the defendants (taken in 1969) in placing persons employed as parkway policemen by the Long Island State Park Commission in a negotiating unit known as the Security Services Unit, pursuant to the provisions of New York Civil Service Law, § 207, deprived them of their constitutional and civil rights as guaranteed by the United States Constitution. More specifically, it is alleged that as a result of being placed in the Security Services Unit (composed of police, security

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All references are to pages of the Appendix, unless otherwise noted.

and correction officers employed in various State agencies and commissions) the 200-odd Long Island State Parkway policemen have been deprived of the "right" to negotiate a collective agreement "for and on behalf of themselves" and, inferentially to be represented in negotiations by the Association.

Defendants moved to dismiss the complaint on three separate but related grounds, to wit:

1. The Court lacks jurisdiction over the subject matter;
2. The complaint fails to state a claim upon which relief can be granted, to wit:
  - a. the action may not be maintained because of res judicata;
  - b. the action is barred by the statutes of limitations in New York Civil Service Law, § 213(a) and the New York Civil Practice Law and Rules, § 217;
  - c. the plaintiffs have failed to exhaust their administrative remedies;
3. The plaintiffs have failed to join a party under Rule 19 (14a).

On August 21, 1974, Judge FOLEY, in a Memorandum Decision and Order, granted the motion to dismiss on grounds (1) and (2) above. He did not reach the third ground.

## ARGUMENT

By arrangement between counsel representing the appellees, this brief will be limited to the question of res judicata.

THE ACTION IS BARRED BY THE  
RULE OF RES JUDICATA

The present five negotiating units which represent all employees in the Executive Branch of the State government (excepting the Division of State Police and the professional staff of State University) were established by the defendant PERB in 1969, as the result of extended hearings held on numerous petitions to decertify the single, all-encompassing unit originally established by the Governor. In the Matter of the State of New York (2 PERB 3035, 3036, 3037, 3038, 3044, 3064).

The Civil Service Employees Association, Inc., which had supported the single unit (having been recognized by the Governor as the representative of that unit) brought a proceeding against PERB under CPLR Article 78, challenging the decision as arbitrary and unsupported by the evidence received at the hearing. The petition was ultimately dismissed and the uniting decision confirmed (Matter of Civil Service Employees Association v. Helsby, et al., 32 A D 2d 131, affd. 25 N Y 2d 842 [1969]).

Following the Court of Appeals decision, representation elections were held in the newly-established units under the super-

vision of PERB and in September, 1969, Council 82, AFSCME, AFL-CIO was certified by PERB as the elected representative of the Security Services Unit.

Several months later, William Rupp, then president of the plaintiff Association, commenced a proceeding under New York Civil Practice Law and Rules, Article 78, against PERB, in New York State Supreme Court, Albany County, alleging that the uniting decision which placed Long Island parkway policemen in the Security Services Unit was arbitrary, etc. and unsupported by the evidence. The Attorney General, appearing as attorney for PERB, moved to dismiss the petition on two grounds:

(1) that the proceeding was untimely, not having been commenced within four months of the determination complained of [CPLR § 217] and (2) that the issue presented had already been decided in the CSEA case, supra. Judgment was granted dismissing the petition on both grounds. (Matter of Rupp v. Klein, Director of Representation [Sup. Ct., Albany Co., 1970]; a copy of the decision is annexed hereto as Appendix A.)

Thus, we submit, the decision in Rupp, supra, involved the same parties (Rupp, suing individually and on behalf of the Association petitioner, against Klein, as Director of Representation of PERB) and the same issues as have been presented in this action in relation to the reasonableness of PERB's determination.

Still later, following the decision in his case against Klein,

Mr. Rupp commenced another action in Supreme Court, Albany County, for a judgment declaring Civil Service Law, § 207 unconstitutional.

A decision was rendered by Justice LOUIS G. BRUHN declaring the section to be valid and constitutional. (Matter of Rupp, individually, etc. v. Rockefeller, as Governor, et al., 4 PERB 7005 [Sup. Ct., Albany Co., 1971].)

Thus, all the issues presented here have been previously adjudicated in actions between these parties.

The District Court wrote on this point:

"Second, because of the previous litigation by the same parties sub nom. in the state courts of the constitutionality of this statute, any similar claim is now barred in my judgment by res judicata, and thus cannot be raised by a § 1983 action." (citing cases.)

To the same effect, this Court in Lackawanna Police Benevolent Association v. Balen (446 F. 2d 53 [1971]) said:

"\* \* \* Having lost in the state courts, plaintiff's remedy was to seek review by the Supreme Court. The Civil Rights Act, unlike federal habeas corpus, does not permit a second bite at the cherry (citing cases)." (p. 53)

CONCLUSION

THE ORDER OF THE DISTRICT COURT TO DISMISS  
THE COMPLAINT SHOULD BE AFFIRMED.

Dated: December 20, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ  
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State of New York  
Attorney for Appellee Governor  
Malcolm Wilson  
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Albany, New York 12224  
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RUTH KESSLER TOCH  
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Assistant Attorney General

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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ALBANY

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In the Matter of the Application of  
WILLIAM F. RUPP, individually and as  
an officer and representative of the  
Policemen's Benevolent Association of  
the Long Island State Parkway Police,

Petitioner,

-against-

PAUL KLEIN, Director of Representation  
for the Public Employment Relations  
Board and the PUBLIC EMPLOYMENT  
RELATIONS BOARD,

Respondents.

---

(Supreme Court, Special Term, Albany County)  
(March 27, 1970 - Cal. No. 21)

Decided June 15, 1970

Justice T. Paul Kane, Presiding

APPEARANCES: Richard Hartman, Esq.  
Attorney for Petitioner  
300 Old Country Road  
Mineola, L. I., N. Y. 11501

Hon. Louis J. Lefkowitz  
Attorney General  
Attorney for Respondents  
(John Q. Driscoll, Esq., Asst.  
Attorney General - of Counsel)  
The Capitol, Albany, N. Y. 12224

T. PAUL KANE, J:

This is an Article 78 proceeding in which petitioner seeks  
a judgment annulling a determination of the Public Employment Rela-

APPENDIX A

tions Board placing the Long Island State Parkway Police in the Security Unit Employees Council and designating it as the recognized or certified negotiating unit. A cross motion is made by the respondents for an order dismissing the petition upon objections in point of law.

The initial proceeding was commenced by service of a notice of petition and petition on respondents on or about March 2, 1970. The determination complained of, however, was made on September 22, 1969 (Respondents' Exhibit A), undisputedly more than four months prior to the commencement of this proceeding (CPLR 217, 3211(a)(5)). An additional legal impediment is the fact that the determination made by PERB, although at that time a preliminary one, was upheld by the courts (Matter of Civil Service Employees Association, Inc. v. Helsby, 32 AD 2d 131, aff'd 25 NY 2d 842).

Accordingly, the petition is dismissed. Judgment may enter accordingly. All papers to Attorney General.

Phillip A. Ferrato, et al.,  
Plaintiffs-Appellants,  
-against-  
Malcolm Wilson, et al.  
Defendants-Appellees.

STATE OF NEW YORK)  
COUNTY OF ALBANY ) ss.:  
CITY OF ALBANY )

Beverly J. Smith, being duly sworn, says:  
I am over eighteen years of age and a Typist  
in the office of the Attorney General of the State of New York, attorney  
for the Appellee herein.

On the 24th day of December 1974 I served  
the annexed Brief of Appellee, Gov. Malcolm Wilson upon the  
attorney s named below, by depositing two copies thereof,  
properly enclosed in a sealed, postpaid wrapper, in the letter box  
of the Capitol Station post office in the City of Albany, New York,  
a depository under the exclusive care and custody of the United States  
Post Office Department, directed to the said attorney s at the  
address es within the State respectively theretofore designated by  
them for that purpose as follows:

Richard Hartman  
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Mineola, New York 11501

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Albany, NY 12205

Richard C. Johnson  
Westgate Building  
Albany, NY

Sworn to before me this

24th day of December 1974

Beverly J. Smith

JOHN L. SMITH  
Notary Public, State of New York  
No. 4602228  
Qualified in Albany County  
Commission Expires March 30, 1975

